

MM 97-182

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Oregon

DEPARTMENT OF  
TRANSPORTATION

AERONAUTICS

October 29, 1997

Office of the Secretary  
Federal Communications Commission  
1919 M Street NW  
Washington, DC 20554

Attention: Docket No. FCC 97-182

DOCKET FILE COPY ORIGINAL

To whom it may concern

The Oregon department of Transportation (ODOT) Aeronautics Section is opposed to the Notice of Proposed Rule Making (NPRM) that proposes to preempt certain State and Local Zoning and land Use restrictions on the siting, placement and construction of Broadcast Station Transmission Facilities. ODOT Aeronautics Section objects to this NPRM on the grounds that preemption of state and local zoning laws, ordinances and regulations will provide the Digital Television (DTV) industry the ability to disregard state and local zoning designed to prevent the creation of hazards to aerial operations, aircraft, users of the airspace system and to provide for the safety of those on the ground in the vicinity of these towers.

The Oregon Aeronautics Section, in partnership with the Federal Aviation Administration (FAA) has, for a number of years, been involved in developing compatible land use around Oregon's airports to prevent the erection of structures that would penetrate the Federal Aviation Regulation (FAR) Part 77, CFR, "Objects Affecting Navigable Airspace." Since the FAA has no land use zoning authority, implementation of state and local zoning laws have been necessary to provide for the safety of the flying public and for those on the ground that could be injured by an aircraft crash.

The FAA/State partnership is reflected in the federally funded State Aviation System Plan. This plan includes development of the Oregon Airport Land Use Compatibility Guidelines document. The State of Oregon Aeronautics Section has a statutory responsibility to the citizens of Oregon and the aircraft owners and pilots of the state, to evaluate the effect of construction or alteration on operational procedures and to make determinations of the possible hazardous effect of proposed construction or alteration on air navigation. This statute reflects FAR Part 77 language for application at the State level.

Experience in the state of Oregon has shown that, while most companies willingly comply with requests for notices and work diligently to make their proposals fit into the "system", there are those that have attempted to completely disregard impacts their project will have on communities, adjacent land owners and for the safety of users of the air and land in the vicinity of these projects. Since most project managers



3040 25th Street SE  
Salem, OR 97310-0100  
(503) 378-4880  
FAX (503) 373-1688  
1-800-874-0102  
(Oregon/Washington Only)

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are anticipated to be unfamiliar with use of the airspace by aircraft and helicopters, and there are no "paved highways in the sky", they may fail to recognize the potential impact their project may have on these aircraft. State and local land use zoning provides the checks and balances to bring these issues into proper perspective and to provide for an evaluation, by aviation experts, on the potential impact projects may have on safety of flight.

Removing state and local land use authority over the placement of these towers could preclude the proper evaluation of airspace impacts in the vicinity of airports. Where a tower is allowed to be improperly sited, airspace may be adversely impacted causing instrument approach minimums to be raised, reducing the ability of the travelling public to gain access to the airport during inclement weather, which ultimately impacts accomplishment of the nation's business.

Tall towers proposed to be sited along major transportation corridors or within mountain passes or canyons should be evaluated by aviation experts for their impact on visual flight corridors and the potential need to mark and/or light these objects. In the Pacific Northwest, the only visual corridors available to aircraft, during the winter months, flying between Eastern and Western Oregon are along major rivers and canyons, beneath cloud layers, that pass through the Cascade Mountains. Improper placement of towers along these routes could, and probably would, result in aircraft crashes and fatalities in these areas. Medical evacuation, law enforcement and rescue aircraft often fly emergency flights in marginal visual flight conditions and utilize these corridors as navigation references.

#### **Specific Comments:**

1. Page 2, item #4., 5<sup>th</sup> line: Marking and lighting requirements are both Federal and State requirements. Submitting the applications concurrently to all interested parties rather than waiting for each response and then proceeding could drastically shorten the timelines on these projects. The proponents may also shorten their timelines by identifying reviewing agencies in advance of anticipated projects.
2. Page 3, item #7. Line 8 to the end of the paragraph: the FAA and state aviation authorities should make a determination that a tower should be marked and/or lighted. The height of a tower should not be allowed to penetrate FAA Part 77 surfaces or other State identified surfaces around airports.
3. Page 4, item #9. Given the number of requests that have been received by this office in the past, the five (5) day response time is unacceptable. The NPRM places no burden on the proponent to ensure that all jurisdictions requiring a response are given adequate notice. A minimum of 15 working days to respond to one request should be provided. Where multiple requests are received in a short period of time, additional response time should be identified.

4. Page 5, item # 11. If the purpose of DTV is to "**serve the public** by exposing as many homes to DTV as possible" the public, which is to be served, should have a say in the manner in which this proposed service will be developed in their community. Perhaps the price to an individual community, in terms of intrusion into the local life style, might be more than a community wishes to have imposed upon them. To the extent that local zoning laws reflect the wishes of a community, DTV development in a given community should not be imposed without due regard to the community's wishes.
5. Page 6, item # 12. Fourth sentence--- "**preemption of state and local zoning restrictions based on environmental or health effects of RF emissions, tower lighting, painting and marking, and health, safety and traditional land use powers**"---. The FAA, through it's congressional mandate, identifies airspace uses which may be a hazard to air navigation and, as discussed earlier, the state of Oregon works in partnership with the FAA in the development of compatible land use zoning to provide for the safety of the airspace system in the state. The state, in turn, works with local jurisdictions to develop appropriate zoning to reflect Federal safety criteria. To eliminate this local review procedure would place the safety of the airspace system at risk. These local zoning ordinances have been in place for a number of years, have stood the test of time and should not be overturned just to meet a time schedule for the economic gain of one industry. Other economic interests may also be adversely impacted.
6. Page 6, item #13. If broad availability of DTV to the American public is an important public interest goal, other goals of the public this industry is envisioned to serve should not be arbitrarily relegated to a lesser position.
7. Page 6, item # 14. State and local ordinances do not, in most cases, result in delays, making it impossible to meet construction schedules. There have been cases where tall tower proponents failed to adequately research review requirements prior to proposing a project and have been required by the initial reviewing agency to get a sign off by other agencies. Submitting the proposal to all reviewing agencies simultaneously would have shortened the review time considerably. Failing to accomplish necessary work before the fact should not be an excuse for failure to meet time lines.
8. Page 7, item # 16. Tall tower siting proposals reviewed by this agency have not appeared to unduly delay the siting of towers throughout the state of Oregon. Specific instances this agency has been involved in have been the resolution of safety of flight concerns where proposed towers would have intruded into the airspace utilized by aircraft flying into and out of airports and along flight corridors within the state. Applying these proposed changes to **all tall towers** would not be appropriate.
9. Page 8, item #18. The alternative of identifying an appropriate time line for comment would be more appropriate. An identified time line should be adequate for a well

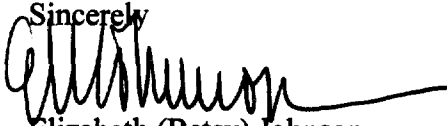
considered response and recognize the proponents responsibility to have the proposal submitted to all reviewing agencies in a timely manner. The response time line should not begin until a reviewing agency has officially received the proposal. Failure to identify a reviewing agency should not be grounds for preemption.

10. Page 9, item # 21. FAR Part 77, CFR 14, Objects Affecting Navigable Airspace, Oregon Administrative Rules Chapter 738, Division 70, Physical Hazards to Air Navigation and local jurisdiction zoning codes, which support these safety of flight standards, should not be preempted or weakened in any manner.
11. Page 9, Item # 23. Normally, a 45 to 60 day time frame is more than adequate for a response from this agency. Consideration should be given to the fact that, in many jurisdictions, staffing levels are critically short due to budget limitations and, where a large number of these applications may be received simultaneously, staff time to evaluate and respond to these proposals may be at a premium. To adequately respond to the time lines the Commission is considering, local jurisdictions need to know how many of these proposals they may be reviewing and when they might be expecting to receive the first proposals. Providing a forum which parties may utilize for suggestions on resolving local disputes would be appropriate. Provision of an outside arbitrator to the parties in a dispute would be appropriate.

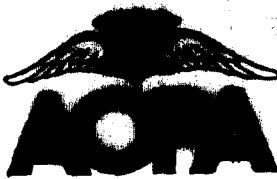
The ODOT Aeronautics Section has reviewed the September 29, 1997 letter submitted by the Aircraft Owners and Pilots Association on this Docket No. FCC 97-182 (Copy attached) and agrees with the comments and issues this letter has stated.

Thank you for providing an opportunity to comment on this issue.

Sincerely



Elizabeth (Betsy) Johnson  
Manager ODOT Aeronautics Section



**AIRCRAFT OWNERS AND PILOTS ASSOCIATION**

421 Aviation Way • Frederick, MD 21701-4798  
Telephone (301) 695-2000 • FAX (301) 695-2375  
www.aopa.org

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Federal Communications Commission  
1919 M Street, NW  
Washington, DC 200554

Attention: Docket No. FCC 97-182

To whom it may concern:

The Aircraft Owners and Pilots Association (AOPA) representing over 340,000 aircraft owners and pilots nationwide is opposed to the Notice of Proposed Rule Making (NPRM); *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement, and Construction of Broadcast Transmission Facilities*. The general aviation community is the largest population of airspace and airport users in the United States and have a significant interest in the safety and efficiency of the National Airspace System (NAS). AOPA strongly opposes this NPRM on the grounds that preemption of state and local zoning laws, ordinances and regulations will result in new hazards to aerial operations, aircraft, and passengers in the United States.

Because of an arbitrary and aggressive implementation schedule, the proponents of Digital Television (DTV) consider state and local zoning as obstacles to their artificially imposed time constraints. For this reason, the industry petitioned the Federal Communications Commission (FCC) for the above referenced NPRM that would essentially circumvent well established state and local zoning protection.

Accelerated implementation of DTV should not be accomplished at the expense of the flying public and it would be an oversimplification to state that current state and local zoning unreasonably delay broadcast facilities construction. (II, Background, .4, page 2-3). Federally mandated "time limits" cannot be enforced nor expected to be complied with in a standardized manner all across the country. The principle as described in the NPRM proposes to remove from local consideration regulations based on the environmental or health effects of radio frequencies emissions, interference with other telecommunication signals, and would also remove from local consideration regulations concerning tower marking and lighting provided that the facility complies with applicable Commission or FAA regulations. As provided for in the NPRM, the proposed changes are related to the health and safety of the flying public (II, Background, .4, page 2-3).

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This proposed rule creates a fundamental conflict of interest within the federal government. The government has established obstruction related standards to ensure public safety on one hand and bypass that same system and its enforceability links with state and local governments on the other, in an attempt to facilitate the implementation of DTV.

The NPRM states that the Commission had the authority to preempt where state or local law stands as an obstacle (III, Discussion, .6, page 3) to the accomplishment and execution of the full objectives of Congress. This creates a conflict of interest when compared to the mandated authority and role that Congress has instituted with the Federal Aviation Administration (FAA) in terms of aviation safety.

The 1996 Telecommunications Act and associated 47 U.S.C. 151 do not justify, mandate or even insinuate that state and local zoning is to be ignored. "To make available, so far as possible..." should not include or be attempted at the expense of aviation safety. Again, 47 U.S.C. 151 "It shall be the policy of the United States to encourage the provision of new technologies and services to the public" certainly does not intend to achieve it at the expense of state and local zoning, especially when it relates to airport and aviation safety. (III, Discussion, .7, page 4). The fact that historically the FCC has sought to avoid becoming unnecessarily involved in local zoning disputes regarding tower placement is illustrative of not only common sense, but also mirrors previous congressional policy (III, Discussion, .8, page 4).

Airports are endangered by constant encroachment of the approach and departure slopes by towers or other vertical obstructions which are impediments to airport safety clearances. Obstructions can be caused by terrain, buildings, towers, and trees or any object that penetrates what can be defined as navigable airspace. Penetrations to navigable airspace may cause unsafe conditions at an airport and may have to be removed, lowered or reconstructed. In many cases, this cannot be accomplished without local and state intervention and guidance, hence the impact of the FCC NPRM.

Since 1928, zoning has been the answer to the problem of airport protection from obstructions. In 1930, the Department of Commerce recommended: "Municipalities and other political subdivisions authorize to do so, exercise the police power in promulgation of properly coordinated zoning ordinances applying equitably to the public airports and intermediate landing fields, and to commercial airports of the public utility class, as well as other land uses."

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This same concern was vividly made public again in 1938 by the Civil Aeronautic Authority (CAA) when it mentioned: "...and, solutions to these problems that have been suggested, there is none as satisfactory, in many respects, as airport zoning." Following federal leadership in this domain, many states since then have adopted legislation authorizing cities and counties to adopt regulations and ordinances limiting the height of structures around airports. By 1941, 31 states had this type of legislation enacted. Many more do today. While things have changed since 1930, they have changed for the better, not for the worse. The federal government position on airport and land use compatibility zoning has been very consistent in the last 60 years.

Today, 49 U.S.C. Section 44718 states, in pertinent part, that "The Secretary of Transportation shall require a person to give adequate public notice...of the construction or alteration, establishment or extension, or the proposed construction, alteration, establishment or expansion, of any structure...when the notice will promote: safety in air commerce, and the efficient use and preservation of the navigable airspace and of airport capacity at public-use airports."

The FAA utilizes Federal Aviation Regulation (FAR) Part 77, CFR 14, "Objects Affecting Navigable Airspace" in an effort to establish standards for determining obstruction to air navigation. In addition to Part 77, the FAA has published documentation of which the purpose is to supplement Part 77. Examples are: Advisory Circular 70/7460-2J "Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace" and Advisory Circular 150/5190-4A, "A Model Zoning Ordinance to Limit Height of Objects Around Airports." These documents are designed to promulgate safety standards.

However, the Federal Aviation Act of 1958, as amended, does not provide specific authority for the FAA to regulate or control how land may be used involving structures or obstructions that may penetrate the navigable airspace. The Federal Aviation Regulations Part 77 only requires "...all persons to give adequate public notice...of construction or alteration...where notice will promote safety in air commerce." The FAA has no power to enforce obstruction standards.

The Advisory Circulars published by the FAA are evidence that the FAA is unable to provide enforcement for situations that arise and have made efforts for the local governments to be informed about the responsibilities they have to establish zoning ordinances.

By examining the statutes relative to the FAA, we can confirm that there is no specific authorization for federal regulations which would limit structure heights, prohibit construction or even require structures to be obstruction marked and lighted. Congress chose to withhold such authority. Since it would involve federal zoning regulations and due process actions, including the taking of property and the paying of compensation, the matter was best left with the states and the local authorities. This federal void is filled by state and local authorities. States and local governments have the responsibility of enacting and enforcing airport-compatible land use.

Given the relative ineffectiveness of the current FAR Part 77 and the advisory nature of the other documentation, it is essential that state and local authorities maintain their ability to adequately regulate tall structures. The FCC NPRM discourages the state and local governments from filling in the federal voids to protect their airports and citizens. We believe that the safety and welfare of persons above and on the ground in the vicinity of airports should be a matter of coordinated federal, state, and local concern. The Federal government established the standards and recommendations, the state and local governments enforce them.

AOPA believes that another federal agency (FCC) should not attempt to do what the federal aviation agency cannot in terms of obstruction related aviation matters. The FCC NPRM has serious aviation consequences and therefore cannot ignore those entities (federal, state, and local) that not only have the expertise, but also the legal right to define obstructions that impact on navigable airspace, especially around their airports.

To protect the public by preventing properly located and constructed airports from becoming worthless through construction or growth of hazards or obstructions in and around such airports, state and local governments all point to zoning to limit the location and height of structures. A state, county, city, airport authority, corporation or individual can spend large sums of money for very essential public and private purpose of constructing and maintaining an adequate airport, only to have the airport rendered worthless and dangerous almost overnight by the erection of obstructions despite adequate and safe state and local zoning laws and regulations, and violating a myriad of these in the process.

Throughout the nation, local zoning and ordinances are the only means to enforce and limit the height of obstructions to airspace and aerial navigation near airports. AOPA is and has worked with state legislatures to improve existing laws and to establish new ones to limit the construction of tall structures that would be dangerous to aviation.



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We also encourage local governments to adopt ordinances and land-use codes that protect navigable airspace, especially in the proximity of airports. This has successfully been achieved in some states where, beyond providing specific guidelines for airport land use compatibility and implementation of airport land use regulations, the state requires permits for any penetration to the FAR Part 77 surfaces. The end result is that local political subdivisions are required to adopt zoning to require a variance for any penetration to the Part 77 and to require appropriate lighting/markings as a condition of such variances. Examples like these represent the best, the safest and most efficient coordinated usage of federal standards, state law, and local ordinances.

While the arrangement between the two federal agencies can be considered a "gentleman's agreement," they both have to face the validity of the airport zoning statutes, which incorporate the basic legal principles which sustain the validity of the zoning. These are now firmly established in the legal jurisprudence of the majority of the states in this nation.

It would be inaccurate to believe that because FAA's Part 77 Regulations and associated processes such as notices of proposed constructions and aeronautical studies are not affected nor mentioned in the NPRM, that the NPRM's impact is non-existent in terms of safety of aerial navigation. This NPRM fails to consider that state and local zoning address and safeguard aerial navigation in cases where FAR Part 77 fails to require FAA notification.

The cases where Part 77 Does Not require FAA notification include:

(1) construction or alteration of LESS than 200 feet, (2) proposed construction of a tower less than 200 feet yet in the vicinity of airports privately owned/operated, (3) objects that are shielded by another object (This may lead to a gradual crawl towards an airport. Each tower is built just a little closer and soon there are 20 of them.), and (4) an addition in height of 20 feet or less to an existing antenna structure.

Furthermore, state and local laws and ordinances are the only protection the flying public has when the towers or obstructions in question are not even considered to be an obstruction under FAR Part 77. The cases where FAR Part 77 Does Not Consider to be an Obstacle are: (1) a height of 499 feet or less and (2) a height of 499 feet when right beside a private use airport.

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Lastly, FAR Part 77 Does Not Consider the following in Determining if an Obstacle is a Hazard to Air Navigation: (1) when a VFR flyway is used many times for a week or two per year, yet not consistently on a daily basis, (2) the future form of navigating via direct (Free Flight Concept) is not addressed in the consideration (Off-airways flying is being utilized more now than ever and will be the primary way to navigate within the next 10-15 years), (3) FAR Part 137 Operations, (4) VFR Military Training Routes (MTR) (this is significant to GA because these MTRs are wider than depicted, and when navigating in the vicinity of an MTR, less attention is paid to the obstructions on the ground, it is also more significant now than ever due to the shortage of airspace the military has to utilize training procedures.), (5) any operation conducted under a waiver or exemption to the FAR's (pipeline patrol, power line patrol), (6) high Density Training Areas, (7) raising the Approach minimums at an airport served by only that one approach, and (8) raising a Minimum Obstruction Clearance Altitude (MOCA) to height of the Minimum En route Altitude (MEA) is OK if there aren't any plans to lower the MEA to MOCA height.

As it can be seen in these three instances, the elimination of certain state and local powers to analyze, regulate, and enforce aviation obstructions and zoning issues not only when covered by FAR Part 77, but also when not covered by these same regulations, will result in a loss of accountability for public safety and cripple state and local government's ability to zone themselves.

State and local governments define hazards contrary to public interest by finding that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also may in effect reduce the size of the area available for landing, taking off, and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public and private investment therein. This understanding is the prevailing idea of zoning; to protect and preserve the health, safety and welfare of the communities in question.

If the FCC NPRM is implemented, many airport sponsors across the country will find themselves dealing with a fait accompli. This will prompt FAA's requirements in obstruction standards to be applied in order to mitigate the impact of the obstruction forced upon them at their own cost. These same standards, lacking enforceability to protect the airspace, are depending on state and local laws to be effective, finds themselves useless other than being used for the purpose of now forcing airports to pay for the safety of the flying public. The safety of the flying public was already addressed initially.

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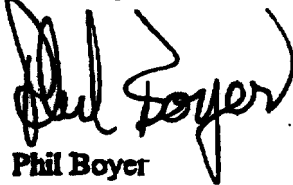
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If serious constructive consideration is to be given to the petitioners request and intention with regards to DTV, it is imperative that these same entities find alternative and cooperative ways to work with both state and local government and agencies instead of forcing upon them another level of federal use of Commerce Power. This is a very serious matter when it is associated with FCC's tendency to overturn FAA determinations of hazards based on appeals and information submitted by construction proponents. Accelerated implementation of DTV for commercial and business purposes cannot and should not be accomplished at the expense of the safety of the flying public.

The protection of airport approaches from dangerous obstructions is a pressing legal problem. Furthermore, AOPA believes that actual implementation of the requested regulatory changes will undoubtedly and literally create hundreds if not thousands of legal conflicts all across the country. This will not result in faster implementation of DTV in the United States.

We thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Phil Boyer", written over a horizontal line.

Phil Boyer  
President